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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

NO. 117

HERMOINE P. RICE,
Petitioner

vs.

LILLIAN P. RICE,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RALPH H. CLARK,
SAMUEL A. PERSKY,
DAVID M. REILLY,
Counsel for Respondent.

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Springfield, Massachusetts, down to the time of his departure for Reno in March, 1944, he told the respondent and others that his job in Springfield was a temporary one and that when the war was over he intended to return to Woodbridge and re-open his automobile business. He also retained his home in Woodbridge during all of that period. In February, 1944, decedent told the petitioner that he was going to Reno for the purpose of getting a divorce. He told the petitioner of the advice which had been given him regarding making a permanent home in Nevada and stated to the petitioner that, "he was never going to come back to Connecticut or the east." (Rec. p. 156.)

When Rice went to Reno in March, 1944, he went there for the sole purpose of obtaining a divorce from the respondent. Although personal service in the divorce action was made upon the respondent by leaving a copy of the complaint in her hands in Woodbridge, Connecticut, no appearance was ever entered by her in the divorce action which had been instituted by the decedent in Reno, Nevada. During the period that Rice lived in Reno, he lived in a rooming house which he had rented by the week and he obtained a job at war work in Reno, which job he resigned on July 2, 1944, the day before he and the petitioner were married. Before obtaining his divorce on June 13, 1944, Mr. Rice told his attorney in Reno that he had made application to the Army Employment Agency for a job, and asked his attorney if it would be all right for him to take such a job at Herlong, California. After moving to Herlong, California, where Rice had obtained a war job, he continued to pay rent for his room in Reno, Nevada, but at a reduced price per week and this room was occupied part of the time by others. Occasionally Rice and his new wife occupied this room in Reno for the week end. The reason why Rice continued to pay rent for the room in Reno was because he did not know whether his job in Herlong, California, would be permanent, or whether he and his wife would like it there, and if they did not like it they intended to return to Reno.

Argument

The sole question presented in this case when it was heard in the Connecticut courts was whether Rice had a bona fide domicil in the State of Nevada at the time he secured his divorce. It has already been decided by this court that where a divorce has been granted in one state, a sister state having jurisdiction of the parties may of itself go into the question of domicil and determine whether a bona fide domicil existed in the state granting the decree. *Williams* vs. *North Carolina*, 325 U. S. 226; 65 S. Ct. 1092. Recently, on June 7, 1948, in the cases of *Sherrer* vs. *Sherrer*, No. 36, Oct. Term 1947 (not yet reported) and *Coe* vs. *Coe*, No. 37, Oct. Term 1947 (not yet reported), this court has further determined that if a defendant in a divorce action enters an appearance in the state court, where the divorce action is pending, he or she is thereafter precluded from raising the question of domicil in any other state. However where the defendant, as in this case, has entered no appearance in the divorce action, the law as laid down in the Williams case still stands.

It is at once apparent therefore that the present case is not one where a state court has decided a federal question of substance not theretofore determined by this court. Apparently petitioner recognizes this and in support of her petition relies solely on the claim that the Supreme Court of Errors of the State of Connecticut decided this case "in a way probably not in accord with the applicable decisions of this court." Our argument is that the record conclusively proves that such claim is unwarranted.

Errors Claimed by Petitioner Are Not Supported by the Record

Petitioner's first claim is that remote and irrelevant evidence was allowed to overturn the Nevada decree. In the opinion rendered by the Supreme Court of Errors of Connecticut (Rec. p. 191) it is stated that claim was made that evidence of [illegible]

tions with his first wife down to the time of his departure for Reno was improperly admitted. The opinion points out that the allegation in the complaint that Rice, during his employment in Springfield, continued to maintain his domicil in Connecticut, was denied. Therefore any evidence that there were no acts, conduct or statements by Rice during that period which indicated an intention to abandon Connecticut as his domicil was properly admitted. It is specifically stated that such evidence was not admitted for the purpose of showing that Rice's matrimonial domicil was in Connecticut, nor was any such question of matrimonial domicil involved in the case.

In further support of her claim that remote and irrelevant evidence was given consideration by the Connecticut court, petitioner has cited a few cases and apparently reached the conclusion that the only relevant facts on the question of domicil are those pertaining to the time after the divorce was secured. Such a conclusion is unsound. The establishment of a domicil is a question of intent. To arrive at the intention of a party, consideration may be given to his acts, conduct and statements at any time. What weight should be given each bit of such evidence is for the trial court to determine.

In the present case, acts, conduct and statements of Rice shortly prior to his departure from Springfield are certainly relevant. Similarly, acts, conduct and statements on his part after arriving in Reno, both prior to and after the securing of his divorce are pertinent and relevant. All such evidence during any of these periods must be considered and weighed in arriving at a conclusion as to what his intentions were regarding domicil.

If the trial court saw fit to disbelieve some of Rice's statements as to what his intention was, it does not follow that a finding of his actual intention has been founded solely on this disbelief. There was ample affirmative evidence to justify the court's conclusions. Many statements by Rice prior to his departure for

Reno, if believed by the court, were sufficient to establish lack of intention to acquire a new domicil. Similarly, much of his conduct and actions after arriving in Reno, both before and after the securing of the divorce, were sufficient to establish lack of intention to establish a new domicil if his statements to the contrary were disbelieved. As stated by the Connecticut court (Rec. p. 191) if his statements that he intended to reside "permanently" in Nevada were disbelieved, it becomes immaterial to determine whether his statement that he intended to remain "indefinitely" should be construed as meaning "permanently."

The petitioner also relies on the claim that the Connecticut court erred in requiring that proof of the abandonment of the Connecticut domicil was a necessary element in proof of a change in domicil. Petitioner claims that the Connecticut cases of *McDonald* vs. *Hartford Trust Company*, 104 Conn. 169 and *Morgan* vs. *Morgan*, 103 Conn. 189, are not good law. It can hardly be disputed that the law everywhere is that a former domicil persists until a new domicil is acquired. The *Morgan* case states that therefore proof of a new domicil of choice is not complete without evidence of an abandonment of the old. What was meant by this statement is explained in the *McDonald* case which was decided not long after the *Morgan* case. This case points out that where one leaves his former domicil with an intention never to return there, he has not as a matter of law abandoned the previous domicil until another one has been established. A quotation from the *McDonald* case at page 177 of the opinion is as follows:

> "Before McDonald could acquire a domicil in Louisville, two things were necessary, he must have established a residence there and while so residing he must have had the intention of making it his home. His intention not to return to Springfield, coupled with his residence in Louisville, were relevant facts tending to prove that he intended to make Louisville his home, but *by themselves* they are not conclusive."

In other words the requirements of domicil are *residence* in a place, coupled with an intention of making it one's *home*. Residence, coupled with an intention not to return to the former domicil, may be relevant facts as to whether there was an intention to make the new residence a home, but they are not conclusive, nor does the mere intention never to return to the former *home* constitute an abandonment of that place as a pre-existing *domicil* until a new one is acquired. In short it is the acquisition of a new *home* in another place that is essential to the acquisition of a new domicil and the acquisition of a new *home* that is necessary before a pre-existing *domicil* can be said to have been legally abandoned. We submit that this is sound law, nowhere contradicted, and supported by all of the definitions of domicil in the decisions of this court.

Petitioner makes a third claim that the language of the opinion by the Connecticut Supreme Court of Errors indicates that the court shifted the burden of proof and placed the burden of establishing the validity of the Nevada decree on the petitioner rather than placing the burden upon the respondent of undermining the verity of the Nevada decree. Petitioner attempts to support this claim by quoting from the opinion of the Connecticut Supreme Court of Errors on page 189 of the record. As so often happens, petitioner has failed to quote at sufficient length. A reading of the opinion commencing at the top of page 188 of the record discloses that the finding of the Referee which was attacked by the appellant was that Mr. Rice had never established a home in Reno and did not have an unqualified intention to make a home there at present and that Reno was not his bona fide domicil. The court pointed out this this was "a finding of ultimate fact, a conclusion drawn from the subordinate facts and inferences therefrom." The opinion says that to be sustained such a conclusion,

> "must have been logically drawn from those facts, without violation of the plain rules of reason. The question for solution is whether under the applicable principles of law the

> Referee was warranted in making this finding and whether the court was justified in rendering its judgment thereon."

After referring to the law on change of domicil, the opinion at page 189 of the record comes to the portion quoted by petitioner on page 15 of her brief. Relying upon the *Williams* case (supra) the court states that the burden was on the plaintiff to prove that Rice did not have a domicil in Reno. What follows in the opinion does not in any way shift this burden. The court merely says that to upset a finding of an ultimate fact of no domicil in Nevada, the appellant must show that the subordinate facts as a matter of law indicate that Rice had acquired a new domicil in Nevada. If we quote further from the opinion where the petitioner has left off, we find the following (Rec. p. 189):

> "Whether the Referee was warranted in concluding that during Rice's stay in Reno, he did not have the requisite bona fide intention to make it his home and therefore acquired no domicil in Nevada depends upon whether this is a reasonable inference from the subordinate facts found."

The *Williams case (supra 236)* and the case of *Esenwein vs. Pennsylvania*, 325 U. S. 279, 281; 65 S. Ct. 1118 are cited in support of this statement. There is nothing in the opinion of the Supreme Court of Errors of Connecticut that counteracts its statement that the burden rested upon the plaintiff to prove that Rice did not have a domicil in Reno. All that is stated is that when the trial court has found as a conclusion of fact based upon the subordinate facts that such burden has been sustained and lack of domicil proven, such a finding of ultimate fact cannot be upset unless the subordinate facts show to the contrary as a matter of law that Rice had acquired a new domicil in Nevada.

The last alleged error relied upon by the petitioner is that the Connecticut Supreme Court of Errors erred in allowing the statement that the decedent went to Reno for the sole purpose of obtaining a divorce to stand as an unreviewable finding of fact. If one reads the entire transcript of the evidence contained in the record

one does not find one bit of evidence as to why Rice went to Reno other than the testimony of the petitioner herself as to what Rice told her in February, 1944, which was that an attorney in Springfield had "told him to go out to Reno to get his divorce." (Rec. p. 154). Again on page 156 of the Record, petitioner's attorney, in addressing a question to her prefaced it as follows:

> "Q. When Mr. Rice told you sometime in February, 1944, that he was going to Reno for the purpose of getting a divorce . . . ."

In view of the fact that petitioner offered no other evidence whatsoever as to Rice's motive for going to Reno, how can she now find fault with a finding that he went to Reno for the sole purpose of obtaining a divorce? It should be noted that the respondent has never claimed that such a motive was conclusive on the question of domicil, nor does the Connecticut court so hold. All that the opinion states is "while such a motive is not conclusive it is a pertinent fact bearing upon the good faith of his residence in Nevada." (Rec. p. 191.)

Conclusion

Petitioner claims that the evidence establishes only that Rice consulted his attorney in two instances before changing his dwelling place, and that advice given him should not tinge with suspicion his actions in reliance thereon. As a matter of fact the opinion of the Supreme Court of Errors of Connecticut (Rec. pp. 190, 191) gives a complete and fair summary and weighing of the evidence on both sides. It is particularly to be noticed that attention is called to the fact that the Referee's finding, "is not what Rice's intention was, but only what he said it was." That such statements might have been regarded as of questionable evidential value is amply supported by the quotations from the cases cited in the opinion. The finding of the Referee that Rice's retention of the room in Reno, "was because he did not know whether his job in Herlong would prove permanent or whether he and the

defendant would like it there" is based on the testimony of the petitioner herself. (Rec. bottom of page 161, top of page 162.)

We submit in closing that this petition is nothing more than an attempt on the part of the petitioner to have this court retry this case upon the facts. An attempt to do this falls squarely within the language of the opinion of this court in the *Esenwein case, Supra, p. 281*. "The Pennsylvania courts have viewed their constitutional duty correctly. It is not for us to retry the facts and we cannot say that in reaching their conclusion, the Pennsylvania courts did not have warrant in evidence and did not fairly weigh the facts."

We say that the record shows conclusively that the Supreme Court of Errors of the State of Connecticut fairly weighed all the evidence in the case by relevant standards of proof, that the finding of the Connecticut court was amply supported in evidence, and that its decision in every way was in accord with applicable decisions of this court and that the petition for writ of certiorari should be denied.

Respectfully submitted,

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